SEBEKAI PLANTATION SDN BHD

v.

SUPERINTENDENT OF LANDS AND SURVEYS, BINTULU

HIGH COURT SABAH & SARAWAK, BINTULU
JOHN KO WAI SENG JC
[LAND REFERENCE NO: 15-04-2008 (BTU)]
27 SEPTEMBER 2011

LAND LAW: *Title - Provisional lease - Meaning of - Whether provisional lease amounted to document of title - Whether could be available for alienation - Sarawak Land Code, ss. 2, 28*

LAND LAW: *Acquisition of land - Provisional lease - Whether compensation payable on such land - Sarawak Land Code, ss. 2, 28*

The subject land herein was a piece of land situated in Bintulu. The parent lot of the subject land was held under Provisional Lease (PL) of State Land (PL) which was issued to the objector by the respondent under the Sarawak Land Code ('the Code'). The land was acquired for the purpose of development of Sabah-Sarawak Gas Pipeline Project, Bintulu Division Sector at Bintulu Division. An inquiry was held under s. 51 of the Code where the respondent awarded no compensation at all by virtue of section 28 of the Code and special condition (iii) of the provisional lease. According to s. 28(1) of the Code, there shall be no alienation of State land unless and until there is completion of the survey and registration of the lease. The State Legal Officer took the view that it is mandatory for the objector to complete and carry out the survey to make the alienation process complete. It was further argued that since the final survey for the PL land to determine the actual area was never carried out, the alienation of the state land to the objector was not concluded and the objector was therefore not entitled to be issued with final lease or title or even for the compensation. The issue for consideration revolved around the interpretation of s. 28A of the Code, that is, whether the PL of a state land is a registrable interest under the Code – as good as a title which confers upon the holder of the lease established proprietary rights to the land as registered owners.

Held (ruling in favour of objector):

(1) A PL is issued to the applicant to enable the commencement of development and planting while the survey of whether the area applied for may be alienated is being carried out. It is only on completion of the survey is the land available for alienation and the lease for the available land surveyed is registered in the name of the applicant. (para 31)

(2) Based on a literal interpretation of s. 28, the PL is a document of title. This is based on the following reasons, namely, that it allows 'ownership' of the PL land to be registered into the name of the PL holder; (b) the definition of 'document of title' in s. 2 of the Code is wide enough to cover a PL; (c) the land premium of RM1,930,305, paid by the objector, supported the fact of alienation on issue of the PL; (d) the PL area was subject to a s. 47 notification procedure requiring a resumption under part IV of the Code, which supported the contention that the objector had been alienated the PL land. (paras 36 & 41)

(3) The choice of the word 'survey' of the land in s. 28(2) of the Code and the 'Not Available' Special Condition connotes in its literal sense that there may be something on the ground or for the PL land to be surveyed (an over view) or for measuring the land at the date of the issue of the PL to make it not to be available for the Government to issue a Lease. This, however, will always be an unavailability event prior to the granting of the PL. This interpretation is in line with 'survey' as contemplated and defined by the Land Surveyors Ordinance 2001. (para 70)

(4) Furthermore, if one were to apply the rules of statutory interpretation to the 'Not Available' Special Condition, it becomes a standard term contract of alienation which the court would construe *contra proferentum* in favour of the objector. Applying this maxim of *contra proferentum*, the Special Condition imposed on every applicant is at the date of issue of the PL, and not on the later date of the completion of the final survey. (paras 76 & 77)

(5) The objector is therefore entitled to be compensated for the compulsory acquisition of the area of the PL land made after the granting of the provisional lease. (para 84)

Case(s) referred to:
Chin Choy & Ors v. Collector of Stamp Duties [1978] 1 LNS 26 FC ***(refd)***
Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***
Superintendent of Lands & Surveys, Fifth Division, Limbang v. Lim Teck Hoo & Anor [1979] 1 LNS 103 FC ***(refd)***
Kon Fatt Kiew v. PP [1935] 1 LNS 28 HC ***(refd)***
Seaford Court Estates Ltd v. Asher [1949] 2 QB ***(refd)***
SOP Plantations (Suai) Sdn Bhd v. Ading Layang & 5 Ors [2004] 1 LNS 331 HC ***(foll)***
Yong Ung Kai v. Enting [1965] 1 LNS 207 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Federal Constitution, art. 13(1)
Land Code (Sarawak), ss. 2, 5, 13(1)(c), 28(1), (2), (3), (4), 45, 46, 47, 48, 51, 60(1)(a)
Land Surveyors Ordinance 2001, s. 2
Rules of the High Court 1980, O. 14A, O. 33(2)

Other source(s) referred to:
Justice GP Singh, CJ, HC Madhya Pradesh, India, *Principles of Statutory Interpretation,* 7th edn, 1999, pp 9, 68

For the objector - Ben Lau; M/s Stephen Robert & Wong Advocates
For the respondent - Ivy Suli Untup; State Attorney General Chambers

Reported by EM Goh

JUDGMENT

John Ko Wai Seng JC:

[1] During the trial, the parties at the direction of the court under O. 14A and O. 33(2) of the Rules of the High Court 1980 were asked to submit on the issue as to whether compensation is payable on compulsory acquisition of a part of land held under a Provisional Lease.

Facts Of The Case

Background: Subject Land

[2] The subject land of this case is a piece of land with an area of 4,1170 hectares more or less known as Lot 9 Block 2 Lavang Land District (being part of Lot 5) Block 2 Lavang Land District and situated at Sungai Sebekai and Sungai Lavang, Bintulu about 70 Kilometres to the North-East of Bintulu Town.

[3] The parent lot of the subject land was held under Provisional Lease of State Land which was issued to the Objector by the respondent under Land Code (Swk Cap 81 (1958 edn.)) (The Code) on 17 February 2004. The leasehold for the subject land is for 60 years commencing 17 February 2004 and expiring on 16 February 2064.

[4] The total land premium payable by the objector for the parent lot of the subject land is RM1,930,305 with the annual rent at RM6,434 per annum.

Acquisition Material Date: 30 November 2006

[5] The subject land was subject to a s. 47 of the Code on 30 November 2006 *vide* Sarawak Gazette Notification No. 3641 and it was later placed under s. 48 on 4 October 2007 *vide* Sarawak Gazette Notification No. 3284.

[6] The subject land was acquired for the purpose of development of Sabah-Sarawak Gas Pipeline Project, Bintulu Division Sector at Bintulu Division.

[7] The court must first determine the material date at which the subject land is to be valued. The material date according to s. 60(1)(a) of the Code is:

> **the market value at the date of the publication of the notification under section 47** or, if no such notification has been published, the market value at the date of the posting of the declaration made under Section 48. (emphasis added)

[8] According to Lee Hun Hoe CJ in Superintendent of *Lands & Surveys, Fifth Division, Limbang v. Lim Teck Hoo & Anor* [1979] 1 LNS 103; [1980] 1 MLJ 58 at p. 61 where he stated:

> To use the language of Wanchoo J, section 47 and 48 are not necessarily "intimately connected". **Section 48 is only applicable if no notification under section 47 has been published.** It is pertinent to note that section 60 speaks of "publication" of notification under section 47. So that **where both sections are used, the earlier date must be taken as the material date for determining compensation.** (emphasis added)

[9] On the above considerations, the subject land was placed under the s. 47 notification on 30 November 2006 and this will be the material date for valuation purposes under the Code.

The Award

[10] The inquiry under s. 51 of the Code was held on the 27 April 2007 and the respondent award "Nil Compensation" for the subject land by virtue of s. 28 of the Code and special condition (iii) of the Provisional Lease.

Legal Issue: Provisional Lease ("PL")

[11] In the award made by the superintendent no compensation was given for the land value of the subject land because on the material date the parent lot of 88, the subject land was held under PL (PL Land). The objector challenges the superintendent's award as inadequate by the failure to include the land value of the subject land in the award.

Respondent's Case

[12] Learned State Legal Officer submitted that by reference to s. 28 of the Code and the specific PL Special Condition (iii) that at the material date the final survey for the issue of the title in the form of the lease had not been fulfilled and done in consequence of which the PL Land had not been alienated to the objector yet.

[13] Learned State Legal Officer submitted that by reference to s. 28(1) of the Code it is clearly stated that there shall be no alienation of the State land unless and until there is completion of the survey and registration of the lease.

[14] Learned State Legal Officer submitted that from s. 28(1) & (2) of the Code and also special condition (iii) of the PL that the objector must complete and carry out the survey to determine the actual area before the issuance of the final title or lease to the objector for the alienation of the PL Land. It is mandatory for the objector to complete and carry out the survey to make the alienation process complete. Since the final survey for the PL Land to determine the actual area has never been carried out, thus the alienation of the state land to the objector has never been concluded that the objector entitle to be issued with final lease or title or even for the compensation.

[15] Learned State Legal Officer referred to a local case *Yong Ung Kai v. Enting* [1965] 1 LNS 207 concerning sale of timber where the contract for sale of timber can only be concluded subject to certain performance or obligation being carried out or executed, which led McGillian J to conclude at p. 99 (I):

> I hold that it was an implied term of the contract between them that performance was subject to the obtaining of any necessary licence and any necessary permission by the defendant.

[16] By applying this principle to the present case, the alienation of the state land can only take place by s. 28 of the Code after the survey has been completed to determine the actual area available of the PL Land for issuance of the title or new lease. Since the survey was uncompleted at the material date of the s. 47 notification there is no alienation by a lease or document of title to entitle the objector to any compensation for the acquisition of any part of the PL Land.

[17] Learned State Legal Officer also submitted that s. 45 of the Code is applicable after the final survey has been carried out where the actual area under the PL has been determined and confirmed, and thereafter the registered proprietor shall surrender his PL for the issuance of the new document of title or lease. Since the alienation of state land to the objector has never been completed as the actual area to be alienated to them cannot be determined since there has never been a final survey carried out for the purpose of the issuance of final title or new lease in accordance with s. 45 of the Code.

Objector's Case

[18] Learned counsel for the objector's contented that a PL of State Land being a registrable interest under the Code is as good as a title which confers upon the holder of the lease established proprietary rights to the land as registered owners.

[19] Learned counsel for the objector submitted that s. 2 of the Code (Swk 152 Cap 81) had defined "alienation" which supports the issue of the PL as an alienation which supports the interpretation of the PL as a document of title under the Code. Learned counsel for the objector contends that the PL being a document of title gives proprietary rights and legal interest to the

holder which therefore is as good as a title or lease which confers upon the registered owner the same proprietary rights and legal interests.

[20] Learned counsel for the objector also contends that the legal rights and proprietary interests conferred to the objector by virtue of the PL is safeguarded and enshrined in art. 13 of the Federal Constitution.

[21] Learned counsel for the objector submitted that the interpretation of s. 28 of the Code does not deny any compensation to be paid to a PL holder when subject to a s. 47 notification post PL. Land Office policy cannot override the law. To do so would also be against art. 13 of the Federal Constitution by citing the case of *S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314, Hashim Yeop A Sani J observed:

> Article 13(1) in my opinion ensures the sanctity of private property. That clause guarantees the right of any person not to be deprived of his property save in accordance with law which simply means that no one can be deprived of his property merely on the orders of the Executive but that he may be deprived of his property only in accordance with law.

[22] Learned counsel for the objector submitted that it is the respondent who ordered the compulsory acquisition and denies the right to compensation of the objector and not the law which provides so and s. 28(2) of the Code is misconstrued and it does not expressly provide for the denial of the right to compensation upon compulsory acquisition. The objector in fact has exclusive right to property on the subject land by citing the case of *Mohamad Rambli Kawi v Superintendent of Lands Kuching & Anor* [2010] 1 LNS 115, where David Wong Dak Wah J explained and discussed on the meaning of property in art. 13(1) and held:

> The word 'property' has been explained in *Corpus Juris*, Vol 73 p. 136 as follows:
>
> > In legal usage "property" is perhaps the comprehensive word which can be employed and it may signify either *the subject matter in which interest exists or it may signify valuable rights and interests protected by law or it may signify both.* It is generally recognized that *property includes certain rights such as*

A *the right of acquisition, possession, use, enjoyment and disposition.* In legal usage, the word property is a generic term. According to the authorities on this question it is a term of broad and extensive application and it is also a term of large import with the very broadest and most extensive signification. It is a very comprehensive word having broad and comprehensive and exceedingly complex meanings and is perhaps the most comprehensive of all the terms that can be used.

In the strict legal sense, the word property signifies valuable rights or interests protected by law and this is the primary appropriate and broader signification of the term. In modern legal system, property includes practically all valuable rights, the term being indicative and descriptive of every possible interest which a person can have in any and every thing that is the subject of ownership by man and including every valuable interests, it can be enjoyed as property and *recognized as such equitable interests as well as legal interests and extending to every species of valuable rights or interests* in either real or personal property or in easements, franchises and incorporal hereditaments.

The property may reasonably be construed to *include obligation rights and other intangible and physical things and thus the word "property" means not only the thing but also the rights in the physical and corporeal thing which are created and sanctioned by law.*

It is generally recognized that property *includes the right of acquisition, the right of dominion, the right of possession, the right of use and enjoyment, the right of exclusion and the right of disposition.* (emphasis added)

[23] Learned counsel for objector also contends that the failure and refusal of the respondent to produce the detailed schedule which in fact was prepared by the respondent amounts to the withholding of evidence and raises an adverse inference under s. 114(g) of the Evidence Act 1950 and there has been an unjust enrichment on the part of the respondent. He further cited the case of *Fernrite Sdn Bhd v Perbadanan Nasional Bhd* [2011] 6 CLJ 1, where Low Hop Bing JCA held:

The concept of unjust enrichment received judicial illumination in Re Estate of Choong Lye Hin, Deceased; *Choong Gim Guan v. Choong Gim Seong* [1976] 1 LNS 130 FC ... The Federal Court held *inter alia* that the circumstances of the case render it inequitable that the appellant should be allowed to retain the benefit

of the payment. Lee Hun Hoe CJ (Borneo) (as he then was) in delivering the judgment of the Federal Court affirmed the statement of the learned trial judge that *"where it is inequitable for the party who received the money or the benefit of any payment to retain it, he should be made to repay or account for the benefit."* (emphasis added)

[24] Also in the case of *Sang Lee Company Sdn Bhd v. Suburamaniam Mayawan & Ors* [2011] 1 CLJ 167, Low Hop Bing JCA invoked the application of s. 114(g) of the Evidence Act 1950 and observed:

In my opinion, the learned trial judge was correct in invoking the presumption under s. 114(g) of the Evidence Act 1950 by reason of the failure of the defendant to call Tan, a director of the defendant at the material time, to give evidence. There is no explanation at all in the evidence of the defendant as to why Tan was not called to testify. Clearly Tan is a material witness for the defendant. Indeed, Tan's evidence is crucial to the defendant. For Tan is the very person that Suburamaniam claimed to have made the oral agreement with. Yet, for reasons best known to the defendant, Tan was not called. To my mind, this failure on the part of the defendant to call Tan is **tantamount to the withholding of evidence.** The presumption under s. 114(g) that ought to be made here is that, had Tan been called by the defendant, his evidence would have been unfavourable to the defendant. (emphasis added)

[25] Learned counsel for objector also contends that in s. 28(3) of the Code, the only condition for a PL not to be registered as a lease is where on survey such area is found not available. It is the objector's contention that the subject land was made unavailable by the respondent himself although it was principally agreed to be given to the objector in consideration of payment of premium and annual rent, and the respondent should not benefit from his own act. In equity, compensation is payable to the objector for being deprived of the subject land from the act of the respondent.

Court's Finding On Entitlement Of PL Holder

[26] The whole legal issue of this case rests on the interpretation of s. 28 of the Code.

PL Land as Title: Alienation

[27] Section 28 of the Code states:

> (1) No State land shall be alienated under this Code unless and until the survey of the land has been completed to the satisfaction of the Superintendent:
>
> Provided that, when immediate survey of any state land is impracticable, the Superintendent may order that a provisional lease in Form C in the First Schedule be executed in favour of the person entitled.
>
> (2) Every provisional lease shall specify the approximate extent and area of the land included therein but shall not entitle the holder to a grant or lease of the whole area specified.
>
> (3) Notwithstanding the payment by him of any rent in respect of the area stated, the registered proprietor of any provisional lease shall have no right to registration of a lease in Form B in the First Schedule for an area equal to the area stated to be alienated if on survey such area is found not to be available.
>
> (4) Save where the context otherwise requires, this Code in connection with leases shall apply to provisional leases and references to a lease shall include a provisional lease.

[28] Section 28(2) of the Code on the requirement of survey has been incorporated as Special Condition (iii) of the PL which states as follows:

> (iii) The holder of this provisional lease shall not be entitled to a lease of an area equal to the area above stated but only to such an area as the survey shows to be available.

[29] Section 28(1) of the Code has allowed the issue of the PL in order that the PL holder can commence economic activities upon the PL Land even before a survey is completed for a lease to be issued as contemplated by the proviso of the section.

[30] Sections 28(2), (3) and (4) of the Code equates a PL as a lease of state land with two reservations, namely, (i) the specified extent and area of the land in the PL does entitle the holder to a grant or lease of the whole area specified as of right, and (ii) even though the quit rent is paid for the stated area the PL 329 holder has no right to registration of a lease in an area equal to the area stated to be alienated if on survey such area is found not to be available.

[31] It had been explained to the court by learned counsel for the objector that the purpose of issuing a PL arose because in an application for alienation of agricultural land for a plantation which involves large tracts of land it will take time to complete the survey to ascertain as to what land in an area applied for is available to be alienated. A PL is issued to the applicant to enable the commencement of development and planting while the survey of whether the area applied for can be alienated. It is only on completion of the survey, is the land available for alienation confirmed and the lease for the available land surveyed is registered in the name of the applicant.

[32] In Justice GP Singh Chief Justice, High Court of Madhya Pradesh, India in his book *"Principles of Statutory Interpretation"* seventh edn. 1999 at p. 9 stated:

> The intention of the legislature thus assimilates two aspects: In one aspect it carries the concept of 'meaning', ie, what the words mean and in another aspect, it conveys the concept of 'purpose and object' or the 'reason and spirit' pervading through the statute. The process of construction, therefore, combines both literal and purposive approaches. In other word the legislative intention ie, the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of the discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed.

[33] In *Foo Loke Ying & Anor v. Television Broadcast Ltd & Ors* [1985] 1 CLJ 511; ([1985] CLJ (Rep) 122) Abdoolcader SCJ at (p. 126) had observed:

> We should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question that is its proper and most known signification.

[34] Abdoolcader SCJ further stated at (p. 126) *(Ibid)*:

> We are of the view that the provisions of the Act under consideration before us call for a purposive and literal construction which is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purpose of the enactment.

[35] Learned State Legal Officer submitted that adopting the rule of literal and ordinary meaning to "unless and until the survey of the land has been completed" in s. 28(1) of the Code means that since the final survey has not been carried out on the PL Land, the alienation of the state land to the objector never been concluded to entitle the objector to be issued with final lease or title.

[36] The court based on a literal interpretation of s. 28 accepts the contention by learned counsel for the objector that the PL is a document of title, as it allows "ownership" of the PL Land to be registered into the name of the PL holder.

[37] The PL is treated and equated as a lease based on s. 28(4) of the Code. It can even be charged to financial institutions and be transferred. Section 2 of the Code states that:

> "alienation" means the sale, lease **or other disposal by a document of 389 title of State land** by or on behalf of the Government.
>
> "document of title" means a grant, lease of State land, occupation ticket or **other document evidencing title to land whenever issued**, but does not include a licence, permit or caveat; (emphasis added)

[38] These definitions are wide enough to cover a PL as a document of title for the alienation of the PL Land to the objector and this is confirmed by Dato' Abdul Aziz bin Abdul Rahim JC (as he then was) in *SOP Plantations (Suai) Sdn Bhd v. Ading Layang & 5 Ors* [2004] 1 LNS 331 where he stated:

> In this regard reference to section 2, the interpretation section, of the 402 Code is useful. That section defines the term 'alienation' to mean 'sale, 403 lease or other disposal by a document of title of State land by or on 404 behalf of the Government ... In this instant case the plaintiff was given a provisional lease. **That is alienation.** (emphasis added)

[39] Exclusive possession is given and development activities on the PL Land by the PL holder commences on its issue leading Sulaiman Daud JC (as he then was) in *Borneo Pulp & Paper Sdn Bhd v. Entika Ak Abus & Ors* [2001] 1 LNS 249 to conclude:

> It is not disputed that the plaintiff is the holder of a provisional lease in respect of the said land by which it is authorised to enter into possession thereof. **By virtue of the provisional lease, being a document evidencing title to the said land,** the plaintiff is also entitled to develop and enjoy the same in accordance with the terms and conditions stipulated therein. (emphasis added)

[40] The subsequent lease notably will be for balance of the term of year less that enjoyed through the PL. Annual rent is paid on the PL by the PL holder.

[41] In this case evidence has been given that land premium RM1,930,305 has been paid by the objector, based on s. 13(1)(c) of the Code and the Land Office practice this has always been levied on all applicants as a matter of course to be paid either by lump sum or by not more than ten instalments from the issue of the PL. Notwithstanding s. 28(3) of the Code, this acceptance of payment of the land premium from issue of PL will also be further evidence of consideration to support the fact of alienation on issue of the PL.

[42] Lastly, if the PL Land has not been alienated why is the area being excised subject to a s. 47 notification procedure requiring a resumption under Part IV of the Code, if the objector have not been alienated the PL Land (Statutory Statement: exh. "P1").

[43] In other words notwithstanding the contention of learned State Legal Officer that under s. 28(1) there must be completion of the survey before there is alienation, the court will construe that the proviso in providing for the registration of a PL before survey is an exception to the rule to have completion of a survey before there can be an alienation. However the alienation by the PL is proscribed by s. 28(2) and (3) of the Code and the not available and other special conditions imposed, particularly in regards of the area to be granted by the lease that it must be found to be available after survey of the PL Land but it will not in any case exceed the area stated in the PL.

[44] The carrying out of the intention and policy for issuing a PL as contended by learned State Legal Officer is now clearly established by the use of reservation and limitation by special conditions like special condition (i)(d) in the PL as to qualify the extent of "availability" post PL which states:

A The lessee shall not be entitled to a lease for any of the land included in this provisional lease which may be required for the purposes of a road reserve.

[45] The use of these special conditions like special condition (i)(d) as inserted in the PL has given opportunity to learned B counsel for the objector to contend and rebut the intention of s. 28 of the Code and the not available special condition of denying them as PL holder from receiving compensation on a compulsory acquisition of any part of their PL Land.

C "Not to be Available" or "Survey Shows to be Available"

[46] We will now have to deal with the issue as to what does "not to be available" or "survey shows to be available" mean and its effect on the entitlement to compensation.

D

Not Available Pre-PL 471

[47] Based on the wording of s. 28 of the Code and reinforced by the not available special condition in the PL, the court would accept and has no problem in holding that if the area in question E is not available to be alienated before the issue of the PL (or pre-PL), the PL holder will be disentitled to require alienation in the lease of such area as can be proven to be not available to be alienated pre-PL.

F **[48]** In justice and equity, the PL holder cannot demand for such areas where rights have accrued before the issue of their PL. The court views that the term "survey" used in s. 28 of the Code is for discovery through the survey of all Native Customary Rights (NCR) land subject to s. 5 of the Code within the PL Land. The G main purpose of the availability provision is to cater for the hiving of such areas claimed as subject to NCR as being not available pre-PL within the meaning of s. 28 of the Code and the not available special condition.

H **[49]** It would be strange to include alienated land as part of the area of a PL, but such alienated land obviously pre-PL is not available and if included in the PL is rightly excluded in the lease issued to the PL holder.

I **[50]** The other form of unavailability may come from s. 34 (excision for right of way) or 38 (statutory reservations for river banks and sea coasts) (which is actually in special condition (e) of the PL) which are all subsisting pre-PL.

[51] Notably all these forms of unavailability are pre-PL because they will be evident upon the PL Land on a survey taken anytime pre-or post-PL. A

[52] Part IV of the Code applies to the resumption of alienated land when 501 required by the Government for the purposes under s. 46 of the Code through compulsory acquisition under ss. 47 and 48 of the Code. Obviously these compulsory acquisition provisions have no application to the Government itself in respect of unalienated or state land as they are untitled, so the problem arises in relation to s. 28 of the Code as to how the Government is to show that a particular area of state land has been earmarked or approved pre-PL as required for a public purpose or local planning to make it not to be available. B C

[53] The court notes that this notification or earmarking was achieved and reserved in respect of the PL by inserting special condition (i)(d) which states: D

> The lessee shall not be entitled to a lease for any of the land included in this provisional lease which may be required for the purposes of a road reserve. E

[54] Since there is no form of formal notification on record like by a s. 47 acquisition on untitled state land, in such an instance if no special condition was inserted in the PL, the respondent by the provision of s. 28 of the Code and the not available special condition can still prove by other evidence that an area of the PL Land is not available pre-PL. F

[55] The court can accept any evidence of pre-PL decisions or plans for excision of state land required for developments or planning by the Government. This can be in the form of correspondence, maps or plans to prove that a certain area of the PL Land had already been approved and earmarked pre-PL in order to allow its excision as not available pre-PL within the meaning of s. 28(2) and (3) of the Code and the not available special condition. G H

[56] The court finds that the issue of a PL is an alienation of state land of the PL Land without need for a concluded survey before alienation. On issue of the PL, pre-PL approvals which makes any part of the PL Land as unavailable and reservations made through special conditions in the PL like special condition (i)(d) for roads will not require compensation to be paid for any excision and resumption of any PL Land. I

Not Available Post-PL

[57] From the evidence adduced before the court the compulsory acquisition for the Sabah-Sarawak Gas Pipeline Project took place *vide* a s. 47 notice dated 4 October 2006 (see exh. "P1": Appendix "C") and completed by s. 48 notice dated 16 March 2007 (see exh. "P1" Appendix: "C/1").

[58] The PL was issued on 17 February 2004. The decision or plan to approve and acquire the areas in the PL Land for the gas pipeline appears to be conceived and confirmed sometime after 2004. This means that at the time the PL was issued, the earmarking for acquisition for laying the gas pipelines had not been conceived at all. Otherwise a reservation could have been made by special conditions for this purpose. This gas pipeline project was therefore approved post PL leading to the post PL compulsory acquisition.

[59] Now we have to consider whether a post PL compulsory acquisition makes the PL Land "unavailable" within the wording of s. 28 of the Code and the not available special conditions of the PL as to disentitle the objector to compensation in the absence of a general reservation like special condition (i)(d). This also hinges on the use of the word "survey" in s. 28 of the Code.

[60] On interpretation of statutory law and the use of the literal interpretation, in the case of *Chin Choy & Ors v. Collector of Stamp Duties* [1978] 1 LNS 26; [1979] 1 MLJ 69 at p. 70, the Federal Court said:

> ... Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rules of the grammar.

[61] This was echoed in *Kon Fatt Kiew v. PP* [1935] 1 LNS 28; [1935] MLJ 239 at 240, where Cussen J stated:

> I must take the sense, not only of particular words, but of a sentence, or a clause as a whole. When the meaning is plain and certain, that meaning must be given to the language of the Enactment, even though the resulting construction may lead to consequences that are surprising and unexpected, and such as one would think could have been intended. If there is any margin of construction fairly open on the language, I am allowed to be guided by the object, scope and general scheme of the enactment so far as such can be ascertained from the provisions of the enactment itself.

[62] In regards to the policy of the statutes, Justice GP Singh Chief Justice, High Court of Madhya Pradesh, India in his book *"Principles of Statutory Interpretation"* 7th edn. 1999, p. 68 stated:

> VISCOUNT SIMON L.C. said: The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. Natural and ordinary meaning of words should not be departed from "unless it can be shown that the legal context in which the words are used requires a different meaning" Such a meaning cannot be departed from the judges "in the light of their own views as to policy" although they can adopt purposive interpretation if they can find in the statute read as a whole or in the material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy.

[63] Learned State Legal Officer had submitted that adopting the rule of literal and ordinary meaning s. 28(1) requires the final survey to be completed before there is alienation through a lease or title and since there was no alienation yet by the PL, no compensation is payable to the objector. This policy and intent can be accommodated by a purposive reading of s. 28 of the Code.

[64] Learned counsel for the objector contends that if the PL Land has not been alienated, why was there a need for the respondent to resort to the compulsory acquisition procedure to excise the gas pipe route for establishing their entitlement to compensation.

[65] The court has found that the issue of the PL is an alienation of state land and hence it followed that the respondent had to resort to the compulsory acquisition procedure to excise the gas pipe route. If the objector is the registered proprietor, as a matter of course he is entitled to compensation for the compulsory acquisition subject to the interpretation of s. 28 and the not available special condition.

[66] Reading s. 28(2) and (3) of the Code, in respect of the wording: "if on survey such area is found not to be available" or in the not available special condition: "only to such an area as the survey shows to be available", they do not in the court's view spell out clearly what is the defining cut-off date to be used to decide when a part of the PL Land is "found not to be available" or the "survey shows to be available". There is a need to construe

based on the above cited authorities s. 28 of the Code to find out what is the date to be used for the survey to check on its unavailability ie, unavailability at the date of the issue of the PL or unavailability as from the date of the completion of the final survey for issue of the lease.

[67] Obviously the literal version supports all pre-PL claims on the PL Land as making all such area claimed to be unavailable within the meaning of s. 28(3) of the Code and the non-available special condition.

[68] The word "survey" is simply defined by Federal Chambers Advanced English Dictionary (2000 edn.) as:

> 1. You survey something when you look at it or examine it at length or in detail, in order to get a general view.
> 2. ...
> 3. Someone surveys an area of land when they measure height and distance in order to draw a detailed map ... etc.

[69] The court also finds the definitions of "cadastral land survey", "survey plan" and "title survey" in s. 2 of the Land Surveyors Ordinance 2001 (Cap 40) useful in understanding what the term survey of land connotes for consistency of interpretation of statutory law which states:

> "Cadastral land survey" means any survey undertaken to mark, identify or determine the extent or boundary or the measurement, of any parcel or area of land and includes title survey;
>
> "Survey plan" means a plan prepared and signed by a land surveyor or a Government surveyor, recording the survey work done or undertaken by him;
>
> "title survey" means *any survey which by the Code or any other written law is required for the purpose of or in connection with the issuance or registration of any document of title* or any instrument affecting or evidencing title to land or parcels within a building subdivided under the Strata Titles Ordinance, 1995 *[Cap. 18]*, and includes in connection therewith –
>
> (a) *the delimitation of the boundaries of any land, including State land and any land lawfully held under native customary rights;*
>
> (b) the development and subdivision of land under Part X of the Code;

(c) the fixing, replacement and removal of boundary marks; A

(d) any survey required for the correct inter-relation of boundaries or boundary marks; and

(e) the making and recording of all measurements and calculations relevant thereto and the drawing and reproduction of plans therefrom. (emphasis added) B

[70] The choice of the word "survey" of the land (as defined above) rather than "checking" of the status of the land in s. 28(2) of the Code and the not available special condition connotes in its literal sense that there may be something on the ground or PL Land to be surveyed (an over view) or for measuring the land at the date of the issue of the PL to make it not to be available for the Government to issue a lease, meaning like a possible claim for Native Customary Rights over the PL Land which will always be a pre-PL unavailability event. This interpretation is in line with and is the title survey as contemplated and defined by the Land Surveyors Ordinance 2001 (Cap 40). C D

[71] The use of the wording "survey" shows the intent in the court's view to actually limit the survey or overview to cover pre-PL and not post-PL unavailability events. It is ridiculous to interpret it to suggest of the need to go on the ground to conduct a survey on the PL Land to look for the approval for projects like the gas pipeline route which may not be evident from the ground yet, being in the future. E F

[72] The mode of checking of ongoing and future projects not on the ground yet will also be correctly termed as a "search" or checking status of the land rather than a "survey" of title at the Land Registry or Land Office itself to find the record or document of approval for a project to make the PL Land unavailable. If a part of the PL Land had been earmarked for an ongoing or future public project or road, this would be information already known at the office of the respondent; there is no necessity to do a survey as such to "find" it is unavailable as envisaged by the literal meaning of s. 28 and the special condition. G H

[73] The scenario at the Land Office lends support to this interpretation that the checking by survey of the land is for pre-PL only and on the PL Land rather than at the Land Registry or office. The applicant objector applies for the alienation of the PL Land and the Government agrees to it. The size of the PL Land I

as here for oil palm plantation makes it untenable to enable the survey to be concluded for a lease to be issued on the spot. The survey is required because the Government cannot alienate what it does not have or have earmarked for itself or public projects at the date of the approval of the alienation to the applicant objector. It appears doubtful that the Government can have in mind the requirements for future public projects or purposes that have not yet been conceived at the time of approving the application by the objector. The Government issues the PL to enable the PL Land to be developed by the objector while a survey is conducted to check what makes the PL Land as not to be available, which can only be for pre-PL. This is because, significantly where the Government knows of future requirements to make an area within unavailable, the special conditions are used to reserve the areas within that may be required like road reserves. Hence, leading to the conclusion that post PL unavailability was not meant to be covered by s. 28 and the not available special condition.

[74] From this above scenario it fortifies the court's conclusion and finding in applying the literal interpretation based on the above cited authorities that the requirement of the s. 28 and special condition survey can only be to cover pre-PL unavailability and not post PL unavailability. This interpretation of s. 28 accords with equity and justice.

[75] The maxim of statutory construction as applied in construing a penal statute strictly (see *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170, at pp. 189d-190b) should also be applied to this situation, especially where a law sanctions the taking away of property without compensation; the law must similarly be construed by the court strictly and in favour of the party subjected to such an appropriation.

[76] Likewise by reducing the statutory provision into the not available special condition, it becomes a standard term contract of alienation which the court would construe it contra proferentum in favour of the objector against the respondent. On this Lord Brightman in *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd* [1983] 2 CLJ 55; ([1983] CLJ (Rep) 7) at (p. 12) stated:

> ... [T]here is a principle of construction that if a document *inter partes* contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

(See also *Borhanuddin Jantara & Anor v. American International Assurance Co Ltd* [1986] 1 CLJ 532; [1986] CLJ (Rep) 73).

[77] Applying this maxim of *contra proferentum*, the court will find that the special condition (i)(d) being imposed to every applicant without fail by law, the cut-off date to find unavailability is at the date of issue of the PL and not as contended by learned State Legal Officer on the later date of the completion of the final survey.

[78] In respect of incorporating intention and policy considerations as contended for by learned State Legal Officer, Lord Denning in the case of *Seaford Court Estates Ltd v. Asher* [1949] 2 QB at p. 499 had said:

> A judge must not alter the material of which it (the prescript) is woven, but he can and should iron out the creases.

[79] Abdoolcader SCJ in *Foo Loke Ying & Anor v. Television Broadcast & Ors* at p. 128 I cautioned:

> What we are however asked to do in this case is not to iron out any creases (and there are none in any event perceptible in the Act) but to replace the material of the Act with linen of the appellants' choice which is certainly not the business of the court. Any such exercitation would mutate and indeed mutilate the intention of the legislature and amount to unwarranted judicial transgression into the legislative domain.

[80] In any event, the court based on the above findings should not undergo such an exercise "to replace the material of the Act with the linen" as put up by learned State Legal Officer in regards to the policy and intent. This can be better achieved and affected through imposing the special conditions to be attached to the PL before it is issued to the applicant for the PL as like for the road reserves etc.

[81] If we accept learned State Legal Officer's argument that post-PL unavailability is within s. 28 of the Code, we will have this scenario:

PL Land was alienated on 17.02.2004, Section 47 notification was imposed on 04.10.2006 say on the whole piece of PL Land, will the law as it stands allow the Government to take back the whole land without any compensation after receipt of payment of the land premium of RM1,930,305.00 and 2 or more years of development by the PL holder for want of completion of the final survey? The result speaks for itself on the injustice this will bring about to the legitimate expectations and constitutional rights of the PL holder without the form of a clear Special Condition to such an effect to claw back for free.

[82] Lastly there is merit in learned counsel for the objector's submission that it is the principal of the respondent, the minister who had made the land not available by his act of approving the compulsory acquisition by invoking Part IV of the Code before the completion of the final survey. Having caused the subject land to be issued under PL to the objector for the land premium, and causing it to be made unavailable post PL by compulsory acquisition, there should be compensation to the objector from its deprivation by the act of the respondent and his principal, the Government who had approved the objector's application for the PL Land in the first instance.

[83] Finally in respect of the interpretation of s. 28(2) of the Code and the not available special condition on post PL acquisition and the objector's right to claim compensation, the court will find that the survey contemplated in s. 28 of the Code is to be conducted to find pre-PL unavailability before the date of the PL or a "title survey". Post-PL unavailability attaching to the PL Land after the issue of the PL is not unavailable within the meaning of s. 28(2) of the Code and the not available special condition from the PL Land as to disentitle the objector from claiming compensation for any part of the PL Land that is discovered to be made unavailable post-PL. The objector as the registered owner is entitled to compensation for any post-PL excision of any part of the PL Land found to be unavailable as such.

[84] In the light that the PL is a document of title, there must be clear words like in the form of special condition (i)(d) reservations for the roads to deprive the objector of their property rights. The objector is entitled to be compensated for the compulsory acquisition of the area of the PL Land made post-PL.

Section 114(g) Evidence Act 1950

[85] On the issue of unjust enrichment and invoking s. 114(g) of the Evidence Act 1950, the court in view of the above finding that compensation is payable for post-PL compulsory acquisition that it is unnecessary to deal with this remaining issue.

Conclusion

[86] The PL being a document of title, there must be clear words in s. 28 of the Code and the special conditions in the PL to deprive the objector of their property rights. The objector is therefore entitled to be compensated for the compulsory acquisition of the area of the PL Land made post-PL.